ILE COPY

No. 127

FILED
JUL 22 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

JACOB ULMON WILEY, EVA P. WILEY AND CHRISTINE WILEY DRAVER, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	8

CITATIONS

Cases:

Black v. United States, 269 F. 2d 38	7
Latham v. United States, 259 F. 2d 393	7
Schaffer v. United States, Oct. Term 1959, Nos. 111 and 122, decided May 16, 1960	6
United States v. Cohen, 124 F. 2d 164, certiorari denied *sub nom. Bernstein v. United States*, 315 U.S. 811	6
United States v. Tuffanelli, 131 F. 2d 890	6

Statutes and Rule:

26 U.S.C. 4741	2
26 U.S.C. 4742(a)	2
Rule 8(b), F.R. Crim. P.	6

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 127

JACOB ULMON WILEY, EVA P. WILEY AND CHRISTINE WILEY-DEAVER, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13-23) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1960. A petition for rehearing was denied on May 5, 1960 (Pet. 39). The petition for a writ of certiorari was filed on June 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly tried together.

2. Whether the verdict should have been set aside on the ground that newspaper articles which did not relate to petitioners prejudiced the jury.

3. Whether the minimum five-year sentence fixed by law for narcotics violations constitutes cruel and unusual punishment.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of North Carolina on marihuana charges. Jacob Wiley and his daughter, Christine Wiley Deaver, were convicted of transferring, on June 11, 1958, 138.230 grains without a proper order form in violation of 26 U.S.C. 4742(a) (count 2). Eva Wiley (wife of Jacob Wiley) and the daughter, Christine Deaver, were convicted of transferring 38.5.90 grains on July 8, 1959 (count 4). In addition, Eva Wiley was convicted of having unlawfully acquired seven ounces without having paid the required tax in violation of 26 U.S.C. 4741 (count 5). Petitioners were each sentenced to a total of five years imprisonment, the minimum punishment for the violations of 26 U.S.C. 4742(a) (Tr. 188-189). The court of appeals affirmed the convictions.

The evidence may be summarized as follows:

1. Narcotics agent Patch testified that on June 5, 1958, he went to a store near Garner, North Carolina, operated by Christine Deaver and her husband where he saw all three petitioners. He asked Jacob Wiley about the purchase of marihuana and was told to return

later (Tr. 3). At that time Jacob said he had some seed (Tr. 26). Patch returned on June 11 and talked with Christine Deaver. When he asked her if she had marihuana for sale, she said that she did not have marihuana but did have seed, enough to sow about four acres. When Patch asked to see the seed, she told him to wait until her father returned (Tr. 4).

When Jacob Wiley returned at about 5:00 p.m., Patch said he would like to buy about ten pounds of marihuana. Wiley replied that he did not have any. He then said he had some seed. The two men and Mrs. Deaver went to the Wiley residence where Wiley took from a shelf in a small room at the rear of the house a large brown paper bag which contained approximately two pounds of marihuana seed. The daughter said the price for the bag would be $125, but Patch bought a lesser amount for which he paid $20 (Tr. 4-5).

2. On July 8, Patch returned and met Christine Deaver who invited him into the Wiley residence. When Patch indicated that he wanted to buy more seed, Mrs. Deaver went to the rear of the house and returned with a brown paper bag containing approximately one pound of marihuana seed which she said she would sell for $125. Patch offered $50 for a half pound. Mrs. Wiley went to the rear of the house and brought back scales on which Mrs. Deaver weighed out a half pound (Tr. 6-7).

On cross-examination Patch said that one Alvin Blount had accompanied him at the time of the two sales and on other visits to the store but not on every occasion when he went to petitioners (Tr. 10-11, 20).

Blount, who was under charges for narcotic offenses at the time he accompanied Patch and at the time of trial, testified on rebuttal, over petitioners' objection. He said he was with Patch on June 5 as well as June 11 and July 8, and that he went to the Wiley residence about six times. His version of the transactions on June 11 and July 8 was substantially similar to that given by Patch, except that he said that on July 8 Mrs. Wiley reached into the bag of marihuana and said it was "good stuff" (Tr. 156-163).

3. On August 18, a search warrant was executed at the Wiley residence. During the course of the search, Mrs. Wiley asked permission to obtain some aspirin and went to a rear room. An agent who was watching her saw that she had something concealed under her arm. This proved to be a brown paper bag containing marihuana seed. The petitioners said it had been bought to the house by a person named Dan George (Tr. 30-33, 39-43).*

4. Each of the petitioners took the stand. Jacob Wiley testified that one morning, late in May, while he and one Vernon Phillips were moving an old sewing machine, some of the drawers fell out, exposing a brown paper bag with green seed. Phillips told Wiley it was "reefer seed," terminology Wiley did not then understand (Tr. 78-79). Wiley said he gave the seed to a

* One of the agents who executed the search warrant testified that, before he identified himself, Wiley had told him that George had approximately twenty pounds of marihuana that Wiley was going to "work" that night (Tr. 43). This testimony was originally admitted against Jacob Wiley alone (Tr. 44), but later the judge told the jury to disregard the evidence entirely (Tr. 71).

neighbor (Tr. 80, 89-90). On June 4, according to Wiley, Blount and another man, who proved to be agent Patch, asked him for directions. While they were there, Phillips came up, greeted Blount, and said that Blount could explain to Wiley what the seed was. When Wiley said he had given away the seed, Patch asked if he could get it back and Wiley agreed to do so. Wiley testified that he did get it back and Patch offered him $20 for a cupful. Wiley told Phillips to make the sale; which he did (Tr. 80-81). Thereafter, according to Wiley, Patch tried to buy marihuana from him, but Wiley refused to have any such dealings. Wiley denied that he saw Patch on June 11 (Tr. 81-82).

Mrs. Wiley testified that on June 11 she heard someone ask her daughter if she had "any of that stuff" and heard the daughter say that she had more of the seed (Tr. 103-104); that Mr. Blount got the scales. The mother understood that the men left $50 (Tr. 103-105). She said that no one came to the house during July (Tr. 106). She said she tried to hide the marihuana seed when the search warrant was being executed in order to protect her home (Tr. 108).

Mrs. Deaver testified that on June 4 Patch and Blount asked for her father and on June 5 told her they were "big time" operators looking for "stuff" (Tr. 118-120). On June 11, when her father was not at home, she saw the two men who asked about the seed her father had promised. She said Blount got the seed and the scales and offered her $100. When she said he would not sell, he said he was leaving $50 which she could give to her father (Tr. 122-123). She denied any transaction on July 8 (Tr. 123).

Petitioners also offered character witnesses who testified to their good reputation (Tr. 133-144, 152-156).

ARGUMENT

1. Petitioners' contention that their motions for a severance should have been granted is without merit. All the charges arose out of interrelated transactions in marihuana seed and were part of a course of dealing between agent Patch and the Wiley family. The counts therefore were properly joined under Rule 8(b), F. R. Crim. P. See *United States* v. *Taffanelli*, 131 F. 2d 890 (C.A. 7); *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811.

There was no prejudice resulting from the joinder. The transactions were so interrelated that evidence of one would properly have been admissible as showing the background for the other. The trial court took great pains to protect the defendants and excluded evidence which would properly have been admissible against one defendant alone as bearing on his knowledge and intent (see, as to Jacob Wiley, *supra*, p. 4, footnote; as to Christine Deaver, Tr. 68-69). The court also carefully charged the jury to consider separately the evidence relating to each offense and each defendant and not to consider against one defendant evidence admitted only against another (Tr. 174). There is thus no basis for the claim of prejudice. See *Schaffer* v. *United States*, Oct. Term 1959, Nos. 111 and 122, decided May 16, 1960.

2. After trial, petitioners moved to set aside the

verdict on the ground that articles appearing in the Raleigh newspapers while the trial was in progress prevented a fair trial. The articles (Pet. 37-38) did not, however, relate to the petitioners or to their trial or to persons mentioned at the trial. The articles merely reported that federal narcotics agents had arrested another group for manufacture and possession of marihuana in Garner, North Carolina, the general region where petitioners lived. As the district court pointed out in denying the motion for a new trial (Tr. 185-186), if mere notice of similar crimes in the neighborhood were sufficient to invalidate a trial, it would be difficult ever to try a case in many large metropolitan areas.

3. The trial judge imposed the minimum sentence fixed by Congress for the offenses charged. A five-year sentence of imprisonment for a serious crime is not unusual punishment which violates the Eighth Amendment. See *Black* v. *United States*, 269 F. 2d 38, 43 (C.A. 9); *Latham* v. *United States*, 259 F. 2d 393, 397 (C.A. 5). The trial court indicated that in fixing sentence he considered age and "every other fact that has been brought before the Court, including the presentence investigation," and that the sentence as to Jacob Wiley would have been heavier were it not for his age (Tr. 187).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JULY 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 851409 41